



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

DECISION

CWA/165225

PRELIMINARY RECITALS

Pursuant to a petition filed April 08, 2015, under Wis. Admin. Code § HA 3.03, to review a decision by the Bureau of Long-Term Support in regard to Medical Assistance, a hearing was held on August 20, 2015, at Milwaukee, Wisconsin. The record was held open post-hearing for the Petitioner's representative to submit closing arguments. A closing argument was submitted to DHA on August 20, 2015 and the record was closed.

The issue for determination is whether the IRIS agency properly reduced the Petitioner's supportive home care hours from 547 hours/month to 23 hours/month.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

Attorney Christine Gabron
4211 53rd Ave
Kenosha, WI 53144

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Gwendolyn Dunkin
Bureau of Long-Term Support
1 West Wilson

Madison, WI

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County. He lives with his family.
2. Petitioner's diagnoses include cerebral palsy, seizure disorder, severe developmental delays, scoliosis, asthma, hidradenitis suppurativa, lichen simplex chronicus. His functional limitations include bowel/bladder incontinence, contracture, and speech. He is legally blind. Petitioner requires assistance with all activities of daily living (ADLs) and all instrumental ADLs (IADLs). Petitioner requires 24 hour supervision.
3. Petitioner has been receiving private duty nursing (PDN) services since 2001.
4. Physician orders for the certification period of April 4, 2014 – June 5, 2014 include:

Skilled care required 24 hours/day. PDN RN/LPN up to 12 hours/day, 7 days/week (total of 84 hrs/week) hours to be used flexibly 1 – 24 hours/day not to exceed 672 hours in an 8 week period, all providers combined.
5. On July 3, 2014, the agency completed a SHC Hours Assessment Tool for Petitioner. The agency noted that 4 adults, including Petitioner, live in his home. The assessor determined the Petitioner had the following needs:

Meal Prep/Set-up: 17.5 hours/month. Paid caregiver. Note: Petitioner is fed via G-tube

Housekeeping: 2.25 hours/month. Paid caregiver.

Laundry: 3.25 hours/month. Paid caregiver.

Shopping: 3.0 hours/month. Natural supports.

Lawn Care - .25 hours/month. Natural supports.

Snow Removal - .25 hours/month. Natural supports.

Supervision: 11.25 hours/day. 12 hours/day provided by natural supports.

Total care hours/day (excluding Private Duty Nursing Care hours): 12

PDN Care hours/day: 12

Additional notes: SHC workers provide 24 hour supervision and SHC tasks like laundry, cleaning, etc. as needed. The PDN provides care as stated on POC per PA. The needs and time spent on tasks for Petitioner vary from day to day but every day he needs 24 hour supervision.
6. Physician's orders for the certification periods of February 11, 2015 – April 10, 2015, April 11, 2015 – June 12, 2015, June 13, 2015 – August 13, 2015 and August 14, 2015 – October 14, 2015 submitted with the PA requests include:

PDN RN/LPN up to 12 hours/day, 7 days/week; hours to be used flexibly 1 – 24 hours/day not to exceed 672 hours/8 week period, all providers combined. 24 hour supervision is required. Mom to provide care when nursing unavailable due to illness or personal matters.
7. Petitioner's primary care physician has been Michael F. [REDACTED] M.D. since his birth in 19[REDACTED]. On August 13, 2015, Dr. [REDACTED] provided a statement that Petitioner has never required PDN 24 hours/day, that he has not signed an order for 24 hours/day PDN and that he is not now ordering 24 hour PDN for the Petitioner. He stated that it is his professional opinion that the Petitioner requires 24 hour supervision but the supervision does not require the skills of an RN.

8. On April 1, 2015, the agency issued a Notice of Action to the Petitioner informing him that his IRIS funded Supportive Home Care (SHC) hours would be reduced from 547 hours/month to 23 hours/month. The basis for the agency's determination is an assertion by the agency that the Petitioner is eligible for PDN 24 hours/day through Medicaid and that he must maximize his MA benefit before IRIS waiver funds are utilized.

DISCUSSION

The petitioner receives medical benefits under IRIS, which stands for Include, Respect, I Self-Direct. This program is a fee-for-service alternative to Family Care, PACE, or Partnership programs for individuals requesting a long-term care support program in Family Care counties. Medicaid Eligibility Handbook, § 37.1.1.

The IRIS program, as an MA Waiver service, may include the following services:

- (1) Case management services.
- (2) Homemaker services.
- (3) Home health aide services.
- (4) Personal care services.
- (5) Adult day health services.
- (6) Habilitation services.
- (7) Respite care services.
- (8) Day treatment or other partial hospitalization services, psychosocial rehabilitation services and clinic services (whether or not furnished in a facility) for individuals with chronic mental illness, subject to the conditions specified in paragraph (d) of this section.
- (9) Other services requested by the agency and approved by CMS as cost effective and necessary to avoid institutionalization.

42 CFR § 440.180(b)

It is a well-established principle that a moving party generally has the burden of proof, especially in administrative proceedings. *State v. Hanson*, 295 N.W.2d 209, 98 Wis. 2d 80 (Wis. App. 1980). In a case involving a request for new services or an increase in services, the participant bears the burden to prove the requested services meet approval criteria. Conversely, in a case involving the reduction of services, the agency bears the initial burden to show that its actions were correct.

In this case, the Petitioner appealed a reduction in supportive home care (SHC) hours from 547 hours/month to 23 hours/month. The IRIS agency argues that physician orders submitted by Dr. [REDACTED] for the Petitioner are orders for 24 hours/day of skilled nursing care/PDN. Skilled nursing care/PDN is a Medicaid service. IRIS policies require a participant to maximize MA benefits before using waiver funds. The agency argues that if the physician orders 24 hours of skilled nursing care, an unskilled PCW or SHC worker may not cover shifts ordered by the physician as skilled care.

The evidence submitted does not support the IRIS agency's position that the physician ordered 24 hours/day of skilled nursing care/PDN. The physician orders submitted with the PA request as well as statements from Dr. [REDACTED] are clear that up to 12 hours/day of skilled nursing care/PDN was ordered. In addition, documents from the agency demonstrate that 12 hours/day of skilled nursing care/PDN was approved and that the Petitioner has billed only 12 hours/day of skilled nursing care/PDN in the past.

The IRIS agency argues that the Petitioner requires assistance with many medically oriented and personal care tasks which are covered by MA. Because the Petitioner is required to maximize his MA benefits before receiving waiver funds, the agency asserts the Petitioner must either utilize PCW services paid by

MA or provide a denial from the MA agency for such services prior to receiving IRIS funds for those services.

The Petitioner counter argues that IRIS Policy 6.0 states that once a participant has maximized the MA plan for PDN services, the participant may use IRIS waiver services, such as respite and supportive home care, for the provision of non-skilled care. I concur that the Petitioner has maximized the MA plan for PDN services based on physician orders for 12 hours/day and the agency approval of 12 hours/day of PDN services.

There is no dispute that the Petitioner requires 24 hour supervision. The SHC Hours Assessment Tool for the Petitioner acknowledges that the Petitioner requires 12 hours/day of supervision beyond the 12 hours/day of PDN care. The ISSP, at Goal #5 states that the Petitioner is to “have supervision by familiar trained adults at all times.” Supervision is clearly part of Supportive Home Care as defined by the IRIS agency. It is not included as “personal care” in the Medicaid program. Therefore, I find that the evidence supports that the Petitioner requires 12 hours/day of SHC supervision as an IRIS participant.

According to the IRIS waiver application, legally responsible persons who may be paid for supportive home care include relatives. In this case, the Petitioner’s ISP states that supervision must be provided by a trained adult. Supervision is provided 12 hours/day as part of PDN services but the Petitioner is entitled to an additional 12 hours/day from a trained adult. The Petitioner’s mother testified and the evidence supports that the family is providing personal care to the Petitioner as needed as natural unpaid supports when a nurse is not available. It is appropriate and reasonable for the family to be paid for the additional supervision that the Petitioner requires. I concur with the Petitioner that this is above what would be considered “normal” for family members to provide as support. In addition, the agency found that the Petitioner requires additional supportive home care of 23 hours/month for meal preparation, laundry and cleaning chores. The agency already determined that this is above what is considered “normal” support by natural family supports.

Based on the evidence submitted, I conclude that it is reasonable and necessary for the Petitioner to receive 12 hours/day (360 hours/month) of IRIS-funded supervision as a supportive home care service. Further, the evidence establishes that the Petitioner requires 23 hours/month of supportive home care for meal preparation/setup, housekeeping and laundry. Therefore, I conclude that the Petitioner is entitled to 383 hours/month of supportive home care. The agency did not act properly when it reduced the Petitioner’s supportive home care to 23 hours/month.

CONCLUSIONS OF LAW

The agency did not act properly when it reduced the Petitioner’s supportive home care to 23 hours/month.

THEREFORE, it is

ORDERED

That this matter is remanded to the agency to rescind the Notice of Action reducing the Petitioner’s SHC hours to 23 hours/month and to take all administrative actions necessary to revise the Petitioner’s IRIS funded SHC to 383 hours/month for supervision, meal preparation, housekeeping and laundry. These actions shall be completed within 10 days of the date of this decision.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

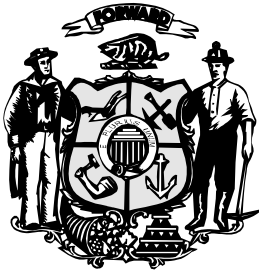
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 13th day of October, 2015

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on October 13, 2015.

Bureau of Long-Term Support
Attorney Christine Gabron